IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2013] NZERA Auckland 252
5396334

	BETWEEN	SHIRLEY ANNE MACDONALD Applicant
	A N D	WHALE PUMPS LIMITED Trading As DENBY CATERERS Respondent

Member of Authority:	James Crichton
Representatives:	Barry Nalder and Murray Broadbelt, Advocates for Applicant Chris Rowe, Advocate for Respondent
Investigation Meeting:	16 April 2013 at Whangarei
Date of Determination:	14 June 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms MacDonald) alleges that she was unjustifiably dismissed from her employment by the respondent (Denby Caterers) and is owed wages from the employment. Those claims are resisted by Denby Caterers.

[2] Denby Caterers is a business which predominantly caters for funerals in Whangarei and the surrounding area. Ms MacDonald was one of a number of staff employed in the business. Denby Caterers say that all of their employees (including Ms MacDonald) are casual workers while Ms MacDonald claims to be a permanent part-time employee. There is no written employment agreement between the parties.

[3] The present owners of the business took over on 1 April 2006. The business is effectively controlled by Mr Mark Carrell. He told the Authority that he had employed all of the staff employed in the business personally, that all of them were employed as casual staff to accommodate the needs of the business, that because of extra duties Ms MacDonald was paid a loading on her hourly rate, that Ms MacDonald regularly assisted Mr Carrell in the recruitment process for new staff and herself made the observation to interviewees that employment was on a casual basis, and that with the exception of one email where a claim was made for extra paid time, the issue of unpaid wages was never raised during the employment.

[4] While the claim is for an unjustified dismissal, in fact both unjustified dismissal via common dismissal and constructive dismissal by forced resignation are pleaded. Denby Caterers deny dismissal simpliciter. They say that the employment came to an end only when the advocate for Ms MacDonald indicated after the claim was raised that Ms MacDonald could not return to the employment.

[5] However characterised, the employment, in a practical sense, ended following a disagreement between Mr Carrell and Ms MacDonald after a text message exchange. This was on 6 July 2012. At this point, it is enough to say that there was an argument between the parties, conducted by text, which resulted in a proposed disciplinary meeting which did not take place and the eventual return of the employer's keys and other property.

[6] A personal grievance was promptly raised after these events and the matter then came before the Authority.

Issues

[7] The three issues that the Authority needs to investigation are as follows:

(a) What is the nature of the employment?

(b) How did the employment end?

(c) Are remedies owed to Ms MacDonald in consequence?

What is the nature of the employment?

[8] Despite the elaborate efforts Ms MacDonald has gone to to have a full audit of her wage entitlement prepared, that whole edifice rests on the shaky proposition that she was a permanent part-time employee, a view that the Authority does not accept. The Authority is satisfied on the evidence it heard that Ms MacDonald was indeed a casual worker employed on an as and when required basis.

[9] The first reason that the Authority adopts for the conclusion that Ms MacDonald was a casual employee is very simply that the facts the Authority heard support that conclusion. The advocate for Denby Caterers relies on *Lee v. Minor Developments Limited Trading As Before Six Childcare Centre* NZEmpC, Auckland, 23 December 2008 for the criteria the Courts look for to establish whether casual employment is present or not. It is submitted that Ms MacDonald's employment was on all fours with the analysis provided in *Lee*. The Authority agrees.

[10] This was a situation where work was on an as and when required basis with no fixed or pre-determined work pattern. The engagement was for short periods of time and for a specific purpose and there was no guarantee when the next engagement would be. This was because the employment was dependant on the availability of work and there was no guarantee when the next job would become available. Further, there was no obligation on the employer to offer work or indeed on the employee to take it when it was offered and the employment was discrete within itself, that is each engagement had a beginning a middle and an end, and while there might be an expectation that there would be further offers of such discrete engagements, there could be no reasonable predictor of when those fresh engagements might happen.

[11] This was a business which primarily catered for funerals within a small geographical area. There was not predicator about when those funerals would take place because there was no way of predicting when people would die.

[12] While it is apparent on Ms MacDonald's evidence that she regularly worked on weekdays, to a lesser extent on Saturday and seldom on Sundays, it is also apparent from her own evidence that there was no pattern to the hours worked. In particular, she was not working any sort of roster, not required to attend to any particular duties for the employer unless and until there was a funeral, or some other event to be catered, which required the services of Denby Caterers.

[13] Similarly, there is no evidence that employees at Denby Caterers applied for annual leave. If they wanted to take a holiday, they simply made themselves unavailable when work came in.

[14] The Authority put to Ms MacDonald the following summary proposition and got her assent: *If there is no funeral, there is no work – no work for the business, and no work for you.*

[15] Following on from that point, it is clear from the authorities that one of the balancing factors is the belief the parties have about the nature of the relationship. In the present case, it is apparent that Denby Caterers regarded the relationship as a casual employment one. Ms MacDonald's evidence is contradictory; she acknowledges that she was originally employed on a casual basis, accepted various propositions to that effect in the investigation meeting, but claimed that the relationship changed when it was agreed that she would undertake some organisation for Denby Caterers. This related particularly to organising staff for functions. There is dispute about what else Ms MacDonald was supposed to organise. In particular, Ms MacDonald claimed that she was responsible for organising supplies as well for functions but Denby Caterers resisted that proposition. For the avoidance of doubt, the Authority prefers Denby Caterers view on that matter.

[16] In any event, Ms MacDonald made the offer to Denby Caterers to provide further assistance, that offer was accepted, and in consequence Denby Caterers increased Ms MacDonald's hourly rate. Subsequent increases in the hourly rate were made to ensure that Ms MacDonald retained her margin above other staff. However, the initial change was effective from 1 January 2007.

[17] So to summarise the parties own views on the matter, Denby Caterers maintained throughout that Ms MacDonald was a casual employee while she regarded herself as casual until she made the offer to take on some extra work for which she was remunerated by an increase in hourly rate.

[18] There is nothing in the additional duties which makes her employment anything less like casual employment. The work is still irregular, on an as and when required basis, and driven by the demand for the services provided by the business. An analysis of the wage slips discloses the absence of a pattern. Whether or not work was performed is an entirely random business. While it may be true that

Ms MacDonald worked more hours after 1 January 2007, because of her additional duties, the hours were still random because the work was still random.

[19] Other staff who gave evidence to the Authority were very clear that the work was casual and that that was how they always understood it. Further, like other staff, Ms MacDonald did not apply for annual leave but just wrote in the work diary *no Shirley*. The Authority is satisfied that Ms MacDonald also chose not to work some of the hours that were available because the time the work was available did not suit her or the kind of work did not suit her. She told the Authority, for instance, that she preferred not to work at nights and typically did not work weddings or race meetings. None of those types of work were regular or extensive but the point here is that Ms MacDonald was able to make that choice not to be available because of the nature of the employment. In the Authority's opinion, Ms MacDonald would not have been within her rights to not make herself available for those classes of work, if she were a permanent part-time employee, unless that was a specific term of her employment agreement.

[20] Ms MacDonald tried to convince the Authority that she was the manager of the business or at least a manager, essentially because Mr Carrell lived in Warkworth and therefore had to travel whenever he was required to be in Whangarei. But Mr Carrell, while acknowledging that Ms MacDonald had accepted some additional duties, was adamant that she was not the manager and as the governing director of the employer, the Authority would expect him to know. But in addition to that point, the other staff of the business who the Authority had the benefit of talking to during the investigation also did not regard Ms MacDonald as a manager; indeed many of them seemed to have very little time for her and suggested that the business was running a great deal more efficiently now that she was gone.

[21] With the exception of calling staff in to work when required, the evidence that Ms MacDonald did anything beyond that is scant indeed. She may have purchased supplies such as bread but then the evidence the Authority heard was that many of the staff did precisely the same thing and there is even evidence that in calling the staff in to work, Ms MacDonald only called the staff who got on with her and ignored the others. Ms MacDonald's claim to be the point of contact for new work was resisted by Denby Caterers and the Authority prefers Denby Caterers' view. The Authority is satisfied that the vast bulk of the inquiries for services came to Denby Caterers

through Mr Carrell and that his forwarding of that information on to Ms MacDonald was simply to ensure that she arranged the appropriate number of staff. The Authority is satisfied it would have been rare indeed for Ms MacDonald to be the initial point of contact for a new job.

[22] In all the circumstances then, the Authority is not persuaded that Ms MacDonald is a permanent part-time employee. In the Authority's opinion, all of the usual indicators of casual employment status are present here and the Authority has not been persuaded that the increased responsibility which Ms MacDonald took at the beginning of calendar 2007 changed her employment status at all.

How did the employment relationship end?

[23] The Authority has not been persuaded that the evidence discloses Ms MacDonald was dismissed, either constructively or otherwise and accordingly it follows that the employment relationship came to an end through her own voluntary choice.

[24] The well known definition of dismissal in *Wellington Clerical IOUW v. Greenwich* [1983] Sel Cas 95 describes dismissal as *The termination of employment at the initiative of the employer.*

[25] In the present case, there is simply no evidence of the employer seeking to bring the employment to an end or, to put it in different words, of a *permanent sending away* of the employee.

[26] What we have here is an argument between Mr Carrell and Ms MacDonald, which was conducted initially by text messaging. It is clear from an analysis of that text exchange that each of the protagonists got cross with the other. Ms MacDonald unwisely accused her employer of lying to her and his immediate response, again intemperate, was to indicate that she was not required at work and that he was *assessing your recent behaviour.* In a subsequent text message in the exchange, Mr Carrell indicated he wished to meet with Ms MacDonald and that he would advise when that was convenient.

[27] The intemperate email exchange continued but eventually Mr Carrell fixed the time and date for the meeting but then discovered that his adviser was not available at that time and date and accordingly Mr Carrell had to abort that meeting and he was in

the process of setting a new meeting date when he received notice of Ms MacDonald's personal grievance claim.

[28] The employer's position then is first that as Ms MacDonald was a casual employee, it was not incumbent upon the employer to provide regular work and second that there was no permanent sending away as the employment relationship was still on foot at the point at which the personal grievance was raised. Mr Carrell immediately responded, sought a meeting, but got no response.

[29] While it is apparent on the evidence that Mr Carrell sought the return of the work keys from Ms MacDonald, through her advocate Mr Nalder, Mr Carrell's evidence is that the reason that he sought her keys was because Mr Nalder's correspondence had indicated that Ms MacDonald no longer wished to work for Denby Caterers again.

[30] Indeed, in the Authority's view, on the balance of probabilities the employment came to an end once Ms MacDonald's representative had indicated she no longer wished to work in the business. Mr Carrell had made it abundantly clear that she would not be offered further employment unless and until he had conducted his disciplinary investigation. He had been deflected from doing that by the arrival of the personal grievance notification and, despite his efforts to get an engagement with Ms MacDonald's advocate, he was completely unsuccessful.

[31] No doubt both parties can be criticised for their intemperate language but there is nothing in the law which requires parties to be perfect. It is conceivable that had the meeting between the parties proceeded, the employment could have been restored and the present proceedings would have been unnecessary.

[32] But Mr Carrell believes that he was *being set up* by Ms MacDonald and he sees that as being borne out by the sudden personal grievance and the expansive nature of the claim. Of course, the Authority is in no position to judge whether the claim was in prospect for some little time, or not. Its obligation is to deal with the claim on its face.

[33] It is clear to the Authority that there was a heated text exchange between Mr Carrell and Ms MacDonald. Ms MacDonald foolishly accused her employer of being a liar and subsequently made references to what other staff were allegedly saying. In a text on 7 July 2012, Ms MacDonald referred to another staff member

saying that Mr Carrell was a liar, a thief and a crooked cop, Mr Carrell having previously served in the Police.

[34] Applying the test for justification to those events, it is difficult to see how a small and relatively under-resourced employer could not have concluded that those matters were sufficient to require a disciplinary investigation. That is what Mr Carrell sought to do. Before he even commenced that process, he had received a personal grievance notification and was subsequently advised that Ms MacDonald no longer wanted to work in the business. The Authority's conclusion as a consequence is that there was no termination of the employment at the initiative of the employer and thus no dismissal.

[35] On the evidence the Authority heard, the employment came to an end as a consequence of the advice from Ms MacDonald's advocate that she no longer wanted to work in the business. The Authority is not persuaded that such advice was caused by Denby Caterers. Denby Caterers were entitled to conduct a disciplinary enquiry; their governing director had just been insulted by Ms MacDonald. A disciplinary enquiry in those circumstances cannot properly be construed as a breach of the employer's duty. In the circumstances, a disciplinary investigation is what a fair and reasonable employer could do. Moreover, there is nothing to suggest the employer adopted a course of conduct with the dominant purpose of effecting a resignation; the employment relationship proceeded normally and was untroubled until the text exchange. And, there is no evidence that Denby Caterers said, " resign or be fired..". In consequence, the Authority concludes there is no constructive dismissal either.

Are remedies owed to Ms MacDonald?

[36] The Authority has already determined that Ms MacDonald was a casual employee and that she has no personal grievance by reason of having been unjustifiably dismissed. As a casual employee, Ms MacDonald is required to work the hours the employer requires, receive payment for those hours, and be available to work again on an as and when required basis. The Authority is satisfied that there is no basis on which, giving the finding of casual employment, Ms MacDonald can mount a claim for a whole lot of hours which she says she worked but for which there was no claim made during the employment.

[37] That finding is consistent with the concession quite properly made by Ms MacDonald's advocate to the effect that if the Authority found that Ms MacDonald was casually employed, the claim made for wages due as a consequence of hours allegedly worked which the employer did not know about or agree to during the employment, must fall away.

[38] This is because the whole point of a casual engagement is to create what amount to a series of discrete engagements, each one separate from the others. There seems an even greater logical difficulty about claiming for hours worked after the end of the employment when the nature of the employment is a series of individual engagements rather than a continuous, albeit part time employment.

[39] Even if that point is not accepted, this is not a wage claim in the usual sense, when there is no argument about the fact of the work being done only about whether payment has been received at the appropriate rate. Here, the employer denies the hours claimed constitute work that was contemplated by the employment, denies that any claim was ever made during the employment and says its legitimate expectation was that work performed during the employment relationship would be claimed for and paid during that relationship.

[40] In case the issue is in any doubt, the Authority preferred the evidence of Denby Caterers to the evidence for Ms MacDonald and thinks her wage claim is frankly specious.

[41] However, for the sake of completeness, the Authority intends to make brief observations about the nature of the wages claim as well. The first point to make is that there is only one email during the employment from Ms MacDonald to Mr Carrell dated 13 August 2011, which she says is evidence that she sought to be paid for hours worked at home. That observation is true as far as it goes but she overlooks the responding email from Mr Carrell which makes it painfully clear that such payment is not within his contemplation.

[42] So, the first point is that there was no wages claim made in the proper form during the employment, only a request for payment for hours worked from home and a refusal on the basis that the business could not afford anything extra beyond the increased hourly rate which Ms MacDonald was paid to compensate her for any additional responsibility.

[43] Second, it is apparent that some of Ms MacDonald's claimed "additional" hours are not additional at all. Her claim for spending time shopping, in her own time, is proved to be inaccurate by reference to the supermarket check out receipts.

[44] Next, the claim for calls on the cell phone also appears to be unsustainable on the footing either that the calls were actually made within paid time anyway or that another large chunk of them were missed calls and yet another group were less than a minute long.

[45] Further, the diary entries which Ms MacDonald relied upon were not entirely contemporaneous, the start and finish times being entered in anticipation of the present proceedings. Other entries simply seemed to the Authority unreliable, such as for example where one staff member attended two contemporaneous funerals but Ms MacDonald effectively claims time for both.

[46] Despite the efforts made by Ms MacDonald and her advisers to interest the Authority in her wage claim, the Authority is not persuaded that either the records are sufficiently reliable to justify consideration or that as a matter legal principle, it is available to an employee in a casual employment to raise a claim for unpaid wages some many months after the employment had ceased. An employment relationship is a bilateral commitment whereby broadly one party provides their labour in return for the other providing wages. It cannot be fair and just for a former employee to simply make claim to additional wages after the employment has come to an end, when there was no claim made during the employment.

[47] The Authority is not persuaded that Ms MacDonald has a claim for unpaid wages for the forgoing reasons. However, she is owed holiday pay which was incorrectly calculated. The Authority is satisfied she is owed the sum of $292.81. Denby Caterers are to pay her that amount.

[48] One final matter needs to be dealt with under this head. Ms MacDonald correctly identifies that she was not provided with a written employment agreement and that part of the dispute between the parties was a function of that omission. A penalty is sought. The Authority accepts the point but declines to award a penalty. The evidence for Denby Caterers is that they have realised their error and now provided all staff with a written employment agreement. In those circumstances, the

Authority is not minded to award a penalty. The point has been made and the lesson has been learnt.

[49] The Authority is satisfied no other payments are owed.

Determination

[50] Save for the payment of the holiday pay in the amount of $292.81, which Denby Caterers are to pay to Ms MacDonald, Ms MacDonald's other claims all fail in their entirety.

[51] The Authority has concluded that Ms MacDonald was employed as a casual employee, not a permanent part time employee, that her employment came to an end at her initiative not the employer's, and that the only additional wages she is owed is the sum of $292.81 in incorrectly paid holiday pay.

[52] For the avoidance of doubt, Denby Caterers is to pay to Ms MacDonald the sum of $292.81 holiday pay.

Costs

[53] Costs are reserved.

James Crichton
Member of the Employment Relations Authority